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No. 03-433

IN THE

Supreme Court of the United States

ALCAN ALUMINUM CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA;
STATE OF NEW YORK,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION; U.S. SENATOR LARRY E. CRAIG; U.S. REPRESENTATIVES MICHAEL G. OXLEY AND JOHN M. McHUGH; N.Y STATE SENATOR JIM WRIGHT; N.Y. STATE ASSEMBLYMAN WILLIAM A. BARCLAY; OSWEGO CITY ATTORNEY EDWARD J. IZYK; NEW YORK STATE CONFERENCE OF MAYORS AND MUNICIPAL OFFICIALS; OPERATION OSWEGO COUNTY, INC.; CHAMBER OF COMMERCE OF THE UNITED STATES; NATIONAL RESTAURANT ASSOCIATION; AND THE ALLIED EDUCATIONAL FOUNDATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a company may be subjected to joint and several liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) for the entire cost of cleaning up a Superfund site, when its contributions to the site contained at most trace amounts of potentially harmful substances.

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INTERESTS OF AMICI CURIAE

The Washington Legal Foundation (WLF)[1] is a non-profit public interest law and policy center with supporters nationwide. WLF devotes a significant portion of its resources to promoting economic liberty, free enterprise principles, and a limited and accountable government. WLF regularly appears as amicus curiae in the Supreme Court and lower federal courts in cases raising important statutory and constitutional issues, including environmental and other regulatory cases. *See, e.g., United States v. Bestfoods, Inc.*, 524 U.S. 51 (1998); *United States v. Hercules, Inc.*, 247 F.3d 706 (8th Cir. 2001). WLF also appeared as amicus in the case at bar in the court of appeals. *United States v. Alcan Aluminum Corp.*, 315 F.3d 179 (2d Cir. 2003) (*Alcan II*).

U.S. Senator Larry E. Craig is the duly elected Senator from Idaho and Chairman of the Subcommittee on Forests and Public Land Management of the Senate Energy and Natural Resources Committee. Senator Craig appeared as amicus in *Alcan II*.

U.S. Representative Michael G. Oxley is the Representative from the 4th District of Ohio and Chairman of the House Financial Services Committee. Representative Oxley formerly chaired the House Subcommittee on Finance and Hazardous Materials which had direct jurisdiction over the Superfund program. U.S. Representative John M. McHugh is the Representative from the 24th District of

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[1] Pursuant to Supreme Court Rule 37.6, amici curiae state than no counsel for a party authored this brief in whole or in part, and that no person or entity, other than amicus Washington Legal Foundation and their counsel, contributed monetarily to the preparation and submission of this brief. By letters filed with the Clerk of the Court, the parties have consented to the filing of this brief.

New York which includes Oswego, New York. Both Representatives appeared as amici in *Alcan II*.

New York State Senator Jim Wright represents the 48th District of New York. New York State Assemblyman William A. Barclay represents the 124th Assembly District of New York. Edward J. Izyk is the City Attorney of Oswego, New York. These officials represent the geographical areas that include the area where the Superfund sites at issue in this case are located.

The New York Conference of Mayors and Other Municipal Officials is a not-for-profit voluntary association whose members represent 60 of the State's 62 cities, as well as 510 of the State's 558 villages. The Conference appeared as amicus curiae in support of Alcan in the related case in the Third Circuit, *United States v. Alcan Aluminum Corp,* 964 F.2d 252 (3d Cir. 1992), and in *Alcan II*.

The Chamber of Commerce of the United States ("the Chamber") is the world's largest business federation. The Chamber represents an underlying membership of more than three million businesses and business organizations, with 140,000 direct members of every size, in every business sector, and from every geographic region in the country. The Chamber regularly advocates its members' view in court on environmental issues of national concern to the business community. The Chamber was an amicus curiae in this case on the first appeal, *United States v. Alcan Aluminum Corp.*, 990 F.2d 711 (2d Cir. 1993) (*Alcan I*), as well as on the second appeal in *Alcan II*.

Operation Oswego County, Inc. is a business development organization in Oswego County, New York. Its mission is to establish and implement sound economic

development strategies in order to enhance the economic vitality of Oswego County's businesses, industries, and citizens leading to an overall better quality of life. Key to the mission is the creation and retention of job opportunities, diversification, and strengthening the local economic base, and developing the local economy in a planned, organized, and environmentally friendly atmosphere. Operation Oswego County, Inc. also appeared as an amicus in *Alcan II*.

The National Restaurant Association is the leading trade association representing the restaurant industry in the United States. The Association represents more than 240,000 restaurants, outlets, catering companies, and other entities. Its member companies have business in every state as well as in Puerto Rico and the Virgin Islands. Member companies range from fine-dining restaurants to fast-food establishments. The decision below raises serious concerns for the restaurant industry because food and cooking wastes that are properly disposed in accordance with all laws and regulations could be deemed to be "hazardous substances" under CERCLA. The National Restaurant Association also appeared as an amicus in *Alcan II*.

The Allied Educational Foundation (AEF) is a non-profit public policy organization based in Englewood, New Jersey. Founded in 1964, AEF promotes diverse areas of study in public policy issues, and has appeared as amicus curiae along with WLF in numerous cases, and appeared as amicus in *Alcan II*.

All amici, their members, and constituents believe that our environmental laws should be enforced in a fair, balanced, and reasonable manner as intended by Congress. The judgment of the court of appeals grossly distorts

congressional intent by imposing strict, joint and several liability under CERCLA for clean up costs of properly disposed of wastes that contain, at best, only a trace of a "hazardous substance."

Such far-reaching liability exposes businesses, municipalities and other entities which operate responsibly in handling and disposing of waste materials to substantial and unpredictable response costs that are incurred by federal and state governments. The liability exposure has hampered and will continue to hamper economic development and growth, and businesses in the competitive global market will be less inclined to locate or expand their operations in the United States. The result will be a loss of jobs and a decline in the economy, especially in the industrial areas of the country which are suffering the most.

Moreover, such broad exposure reduces the incentive for businesses to undertake measures to "clean" their wastes before disposal if they are going to be held jointly and severally liable for cleanup costs of Superfund sites, regardless of the level or concentration of hazardous substances that are contained in their wastes.

SUMMARY OF ARGUMENT

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601 *et seq.*, was enacted by Congress in 1980 to address the significant harm to the environment posed by dangerous and hazardous wastes from abandoned waste sites, such as Love Canal, as well as those from active sites. A lame-duck 96th Congress -- far from "carefully formulat[ing]" CERCLA's provisions as the United States suggests (Opp. 12) -- quickly rushed the bill through the legislative process

as one of that body's last actions, producing what many courts and commentators have agreed is an incomprehensible statute with an equally enigmatic legislative history.[2]

This case presents the Court with a perfect and rare opportunity to address and make some sense of an important and recurring question of federal law, namely, whether Congress intended under CERCLA that businesses, municipalities, and other entities could be saddled with costly and ruinous joint and several liability for cleanup costs of an entire Superfund site where their non-hazardous wastes contain trace amounts of an EPA listed hazardous substance, even if that hazardous substance happens to be only one molecule of a ubiquitous man-made chemical. Amici submit that the answer to that question is an emphatic "no" and that this Court should review and reverse the erroneous judgment of the court of appeals to the contrary. Otherwise, the disposal of virtually anything in the universe, including rainwater, soil, and milk, would trigger liability under CERCLA.

An important related question is whether the court of appeals erred as a matter of law by ruling that harm caused by the release of the hazardous substances from a site cannot be divisible, and therefore, the response costs cannot

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[2] See *United States v. Conservation Chemical Co.*, 619 F. Supp. 162, 204 (W.D. Mo. 1985) (CERCLA is "a hastily assembled bill and a fragmented legislative history adds to the usual difficulty of discerning the full meaning of the law."); *Commander Oil Corp. v. Barlo Equip. Corp.*, 215 F.3d 321 (2d Cir. 2000) ("We are called upon in this case to resolve yet another ambiguity within CERCLA's miasmatic provisions."); *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 257 (3d Cir. 1994) (CERCLA is "riddled with inconsistencies and redundancies").

be apportioned, simply because the *non*-hazardous components of the waste of a company could spread the hazardous wastes produced by others. Amici submit that the court of appeals' answer to that question also threatens to expose entities to unfair CERCLA liability, and thus, should be reviewed and reversed as well.

REASONS FOR GRANTING THE PETITION

I. THE QUESTION OF WHETHER A COMPANY CAN BE SUBJECT TO JOINT AND SEVERAL CERCLA LIABILITY FOR TRACE AMOUNTS OF ONLY POTENTIALLY HARMFUL SUBSTANCES IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE DECIDED BY THIS COURT

The United States brought this cost recovery action against Alcan Aluminum Corporation (Alcan) under CERCLA, 42 U.S.C. § 9607, for the disposal of its emulsion at two Superfund sites in upstate New York. Alcan's emulsion consisted of 95 percent water and 5 percent mineral oil. Significantly, neither the virgin emulsion as a whole, nor its water and mineral oil components, are classified as "hazardous substances" under (CERCLA), 42 U.S.C. § 9601(14).[3] Rather, the used

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[3] In its Opposition, the government repeatedly and misleadingly refers to Alcan's emulsion as "waste oil emulsion." *See, e.g.*, Opp. 9-10. Since almost all of Alcan's emulsion is plain water, it would be more accurate to refer to Alcan's substance as a "water emulsion" rather than the more sinister sounding "waste oil emulsion," particularly when the mineral oil component of the emulsion is *not* a listed hazardous substance. In any event, amici will simply refer to the liquid as "emulsion" or "waste emulsion" in their brief which is the same terminology used by the court of appeals.

emulsion contained traces of certain metal compounds which, while technically classified as "hazardous substances" under CERCLA, were essentially harmless because of their below background levels.

After settling with 82 of the entities which generated hazardous wastes at the sites, the United States sought to impose joint and several liability upon Alcan, the only non-settling party, for the remainder of all the unreimbursed costs, totalling some $13.6 million.[4]

Central to the CERCLA liability scheme, and the most troubling aspect of this case, is the definition of "hazardous substance," the release of which triggers the imposition of strict, joint, and several liability. 42 U.S.C. § 9601(14)(B). A literal definition of "hazardous substance," without any requirement of quantity, concentration, or toxicity, would apparently cover "any element, compound, mixture, solution, or substance" designated by the EPA, however benign. Under this broad definition, "hazardous substances" would be found in, and thus include, breakfast cereal, garden soil, milk, and other life-supporting substances. See *United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 716 (2d Cir. 1993) (*Alcan I*); Opp. 4, n.1 (citing cases).

Congress clearly did not intend that almost

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[4] While the statute is silent on the issue, most lower courts have construed CERCLA to impose strict (and retroactive) liability upon so-called "responsible parties" and to impose joint and several liability for the entire harm and response costs, but only if the harm from the release of hazardous substances is not divisible. See Opp. 5 (citing cases). If the harm is divisible, then liability is apportioned on a reasonable basis rather than jointly and severally. Amici address the divisibility issue in Point II, *infra*.

everything in the universe would be a "hazardous" substance. "There is nothing to suggest that Congress intended to impose far-reaching liability on every party who is responsible for only trace levels of waste. Several courts. . . have rejected the notion that CERCLA liability 'attaches upon release of *any* quantity of a hazardous substance.'" *Acushnet Co. v. Mohasco Corp.*, 191 F.3d 69, 78 (1st Cir. 1999) (citations omitted).

A basic canon of statutory interpretation is that courts should interpret statutes to avoid absurd results. *See, e.g., Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978); *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 454 (1989) ("Where the literal reading of a statutory term would 'compel an odd result, * * * we must search for other evidence of congressional intent to lend the term its proper scope."); *Commonwealth of Massachusetts v. Blackstone Valley Electric Co.*, 67 F.3d 981 (1st Cir. 1995) (court rejected broad definition of "cyanide" as hazardous substance since it would include everyday substances such as vitamin B-12 and lead to "nonsensical results").[5] As petitioner correctly notes, whether a substance is truly hazardous or not depends upon the *concentration* and *dose* of the substance. Pet. 7.

Acknowledging the force of these arguments by Alcan and its amici, the Second Circuit, instead of interpreting the definition of "hazardous substance" narrowly to comport with the intent of Congress, nevertheless crafted what it called a "special exception" to the liability standard that would essentially accomplish the

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[5] *See* Cathleen Clark, *Should the Butcher, the Baker and the Candlestick Maker Be Held Responsible for Hazardous Waste*, 1994 Utah L. Rev. 871, 916 (1994).

same result. Thus, in *Alcan I*, the court of appeals held that a defendant such as Alcan could "escape payment where its pollutants did not contribute more than background contamination and also cannot concentrate." 990 F.2d at 722. In doing so, the court's "special exception" implicitly acknowledges the fact that disposing substances, mixtures, or solutions that contain only background levels of a listed hazardous substance does not *cause* the incurrence of response costs.[6]

Yet on remand to the district court, Alcan was deemed not even eligible for the special exception because the district court made new findings based on circumstantial and questionable evidence that Alcan's otherwise non-hazardous emulsion contained some polychlorinated biphenyls (PCBs). The court of appeals determined in Alcan's second appeal that this finding was dispositive for jettisoning its previous below-background exception for the following reason:

> The finding that Alcan's waste emulsion contained PCBs is particularly significant because -- as the district court properly ruled -- it disqualifies Alcan from escaping all CERCLA liability. See *Alcan-Consolidated*, 97 F. Supp. 2d at 268-69. The "special exception" that we created when this case was previously before us was intended to excuse a responsible party from all CERCLA liability only in instances where (1) a party contributed hazardous

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[6] *Cf. United States v. Township of Brighton*, 153 F.3d 307, 319 & n.14 (6th Cir. 1998) (defendants who are not responsible for any of the harm "have effectively fixed their own share of the damages at zero. No causation means no liability, despite § 9607(a)'s strict liability scheme.").

> substances to a site in quantities that did not exceed background levels and (2) the hazardous substances were incapable of concentrating. See *Alcan*, 990 F.2d at 722. We created this exception based on an awareness that some CERCLA hazardous substances, like metals, occur in the environment naturally. The narrow exception carved out was aimed to shield from liability those entities that have contributed "hazardous" substances -- defined as such in the law -- to a site but whose contribution -- in the absence of EPA thresholds -- did not exceed natural background levels, and did not themselves trigger the incurrence of response costs. Because Alcan's emulsion was contaminated with PCBs, which are man-made substances without natural background levels, Alcan cannot escape liability under the special exception this court articulated.

Pet. App. 10a. The court of appeals completely gutted its below-background exception based on the wholly arbitrary and artificial distinction between background levels of natural hazardous substances and manmade hazardous substances such as PCBs. In short, the court of appeals concluded with the urging of the government that a background level of PCBs is zero; anything above that level subjects an entity to joint and several liability.

Because of the ubiquitous presence of PCBs in the environment, virtually every non-hazardous substance automatically becomes a hazardous substance simply by being exposed to the air where PCBs can be found. If left intact, the court of appeals ruling threatens to expose entities to costly and ruinous liability for cleanup costs of a Superfund site simply because they lawfully disposed of otherwise benign non-hazardous waste at sites or landfills as

directed by the government authorities.

The inescapable and unrefuted fact is that PCBs have background levels in the natural environment -- in the air, water, and soil. PCBs are ubiquitous and can be found in such pristine areas such as the Arctic.[7] As Alcan poignantly noted, the Food and Drug Administration (FDA) has even set allowable levels of PCBs that contaminate our food and food packaging. Pet. at 9 (citing to 21 C.F.R. § 109.30) (reproduced hereto as an Appendix to amici's brief). Notably, the FDA regulation -- which falls within Subpart B entitled "**TOLERANCES FOR UNAVOIDABLE POISONOUS OR DELETERIOUS SUBSTANCES**" -- recognizes that PCBs are "toxic, industrial chemicals [which] have become a persistent and *ubiquitous* contaminant in the environment." *Id.* (emphasis added). The FDA has set acceptable and tolerable limits of PCBs that contaminate our milk, poultry, eggs, fish, and even "*infant and junior foods*." 21 C.F.R. § 109.30(a)(1)-(9) (emphasis added). Amici App. 2a. In short, while the government deems it safe for infants to eat PCB contaminated food, disposing of that same food or other wastes which may contain even *less* of a concentration or amount of PCBs, subjects the entity to costly joint and several liability for discharging a "hazardous substance."

The government's feeble response to that absurd result is that the FDA "does not purport to establish permissible 'background' levels of PCBs for purposes of

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[7] *See Washington Post*, May 17, 2001, at A17 (PCBs travel naturally in "ocean currents, or in the winds, falling in places where they have never been used * * * . More than 6 tons of PCBs reach the Arctic each year this way."). Thus, while PCBs are synthetic, they have a "natural" background level.

CERCLA response action." Opp. 15, n.4. But what the government does not and cannot address or recognize is that PCBs, because they are ubiquitous, have background levels in the environment. Accordingly, there is no reason in the law or logic to impose CERCLA liability upon an entity that merely disposes of a non-hazardous substance such as water, simply because it may contain, and most certainly does contain, a harmless PCB molecule.

Further undercutting the position of both the court and the government in this regard is EPA's own remediation policy that, as Alcan noted (Pet. 9), recognizes that both natural and many manmade pollutants have background levels above zero, and, hence, do not require cleanup. EPA, Office of Solid Waste and Emergency Response, Office of Emergency and Remedial Response, *Role of Background in the CERCLA Cleanup Program*, OSWER 9285.6-07P, at 7 (Apr. 26, 2002). Otherwise, an EPA ordered cleanup would result in the site being cleaner than the surrounding natural area. Here too, the government feebly responds by claiming that the background levels of PCBs that may be taken into account are those that are "present as a result of human activity but not specifically related to the CERCLA release in question." Opp. 15, n.4.

Both of these non-responses simply illustrate the bankruptcy of the government and lower courts' positions.[8]

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[8] The United States position in this case also appears to conflict with its position before the European Commission on the EU's draft chemical regulation. In its comments to the EU, the United States complained that the draft regulation "appears to adopt a particularly costly, burdensome, and complex approach, which could prove unworkable in its implementation, adversely impact innovation and disrupt global trade." *Comments of the United States on the*

In short, unless the Second Circuit is overturned on this score, the disposal of liquid or solid wastes by manufacturers, or food and food packaging materials by restaurants, which already contained trace amounts of PCBs before the waste was disposed, exposes the businesses to strict, joint, and several liability.

The decision below is not only contrary to law, but also contrary to sound public policy. Unless overturned or revised, the decision would discourage companies from incurring expenses and developing technology to reduce the level of hazardous substances in their wastes before disposal. If a company is going to be held strictly, jointly, and severally liable for the cleanup costs of the wastes from other entities, regardless of the relative toxicity of its own wastes, the company would have little or no incentive to develop methods and technology to "clean" its wastes before disposal.

Under the Second Circuit's rationale, if Company A disposes 1,100 gallons of clean wastewater containing only trace levels of PCBs at a waste site that already contains 110 gallons of *heavily* concentrated PCBs disposed of by Company B, Company A could be held liable for up to 100 percent of any cleanup costs, even though the real polluter could be not liable at all (due to the 2002 amendment to CERCLA exempting up to 110 gallons of liquid waste from liability, 42 U.S.C. § 9607(o)), or only liable for as little as one percent of the costs based solely on volumetric ratios.

European Commission Draft Chemicals Regulation (July 10, 2003) at 2. In particular, the U.S. expressed concern that regulation should not focus on chemicals that have "low intrinsic hazard" or "low exposure potential." Rather, resources "should focus on chemicals . . . likely to pose the greatest health and environmental risks." *Id.* at 3.

This unfair result would obtain even though the concentrated PCBs from Company B became diluted and less harmful, thanks to Company A's cleaner water.

Imposing CERCLA liability in cases such as this is patently unfair, unpredictable, and uninsurable. Amici local governments and municipalities which provide waste collection and disposal services for their citizens are exposed to joint and several liability for any cleanup costs at a disposal site since all trash, food remains, paper, vitamins, cereal, and even leaves and lawn clippings could be considered "hazardous substances" under the lower court's opinion and not be eligible for the limiting special exception. In short, the decision of the lower courts in this case violated the intent of the Congress that "polluters pay" for the remediation costs.

II. THE LOWER COURT'S CONCLUSION THAT THE HARM IS NOT DIVISIBLE RAISES AN IMPORTANT QUESTION OF CERCLA LIABILITY

Even assuming, *arguendo*, that Alcan could not escape liability altogether because there is no permissible background level for PCBs, and that the presence of one PCB molecule in water will suffice to impose joint and several liability for cleanup costs, the court of appeals -- reiterating language from its earlier decision in *Alcan I* -- stated that Alcan could nevertheless limit the extent of its liability by showing that it "contributed at most to only a divisible portion of the harm." Pet. App. 8a.

Far from being a "fact-specific challenge" to the court of appeals ruling on the issue of divisibility as the government suggests (Opp. 18), the initial question of

whether a harm is divisible is a pure question of law that is reviewed *de novo*. *In re Bell Petroleum Services, Inc.*, 3 F.3d 889, 902 (5th Cir. 1993); *United States v. Hercules, Inc.*, 247 F.3d 706, 718 (8th Cir. 2001). Here, both the district court and court of appeals stumbled badly and erred as a matter of law in determining that the harm was not and could never be divisible, regardless of the PCB levels that may have been in the emulsion. Accordingly, amici submit that review by this Court is warranted in order to provide much needed guidance to the Second Circuit and other lower courts on the proper application of common law principles of apportionment of harm and divisibility as reflected by the Restatement (Second) of Torts, §433A (1965).[9]

The court of appeals purported to justify its finding of no divisibility as follows:

> Our conclusion that Alcan is jointly and severally liable for the harm caused at PAS and Fulton is based upon the district court's finding that
>
> > * * * Alcan's emulsion *contributed* to the breadth of contamination at both PAS and Fulton. In other words, even if the hazardous substances in Alcan's emulsion themselves did not *contribute* to the response costs at the sites (which the PCBs and nickel did), the emulsion as a whole *contributed* to

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[9] **§ 433A. Apportionment of Harm to Causes**

(1) Damages for harm are to be apportioned among two or more causes where

(a) there are distinct harms, or

(b) there is a reasonable basis for determining the contribution of each cause to a single harm.

both the release and response costs.

Pet. App. 12a-13a, citing *Alcan-Consolidated*, 97 F. Supp. 2d at 270 (emphasis added). But this facile conclusion simply begs the question: was the harm nevertheless divisible or subject to reasonable apportionment under the Restatement and common law principles? Putting aside the reasonable notion that Alcan's emulsion may have actually *diluted* the hazardous substances disposed of by others at the site, and thus, ameliorated any environmental harm, the court's rejection of any divisibility of harm as a matter of law has enormous consequences for businesses.

The government struggles vainly to defend the faulty reasoning of the court of appeals by noting that after all, the non-hazardous water and mineral oil which moved other hazardous substances contained the ubiquitous PCBs (regardless of the amount), and that technically speaking, this mixture "in itself, qualified as a hazardous substance" (Opp. 20), even though the PCBs themselves had absolutely nothing to do with the emulsion spreading the waste. Amici submit that the presence of a trace "hazardous substance" in Alcan's or anyone else's benign emulsion or waste cannot be the bootstrap or trigger that imposes massive multi-million dollar joint and several liability.

The district court went astray with its tortured and result-oriented application of the Restatement to show there can be no divisibility by citing only to certain gun hypotheticals from Prosser & Keaton on Torts (5th Ed. 1984) that discuss only *indivisible* harm. Pet. App. 54a.[10]

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[10] [T]he conduct of multiple tortfeasors need not be simultaneous to cause an indivisible harm, "[o]ne defendant may create a situation upon which the other

These gun hypotheticals are clearly distinguishable from this case, and not surprisingly, were not discussed, let alone cited with approval, by either the court of appeals or the government. The "single gun" example is clearly inapposite here since there are multiple sources of the pollution in this case. The "separate guns" example fails too because that scenario contemplates only one final result from the shooting: death.[11]

The Restatement is replete with more apt pollution scenarios that call for divisibility and apportionment; the courts below ignored these more relevant scenarios. As the Restatement notes, "apportionment is *commonly made* in cases of private nuisance, whether the pollution of a stream, or flooding, or smoke or dust or noise, from different sources, has interfered with the plaintiff's use or enjoyment of his land." § 433A, cmt. d. (emphasis added).

> may act later to cause damage." [Prosser] at 348. For example, "[i]f two defendants, struggling for a single gun, succeed in shooting the plaintiff; there is no reasonable basis for dividing the liability." *Id.* at 345. Moreover, if two defendants shoot the plaintiff "independently, with separate guns, and the plaintiff dies from the effect of both wounds, there can still be no division." *Id.*

Pet. App. 54a.

[11] As the Restatement is careful to note, "[c]ertain kinds of harm, by their very nature, are normally incapable of any logical, reasonable, or practical division. Death is that kind of harm, since it is impossible. . . to say that one man has caused half of it and another the rest." Restatement § 433A, cmt. on subsec.(2)(i). In this case, the environment at the PAS and Fulton sites may have been wounded or harmed, but it certainly was not "killed" or completely destroyed.

Ignoring the Restatement's pollution examples, and relying instead on the inapt gun/death hypotheticals, the district court came to the erroneous conclusion that "where two independent causes combine to cause an aggregate harm which exceeds the sum of the individual harms such that the harm attributable to each PRP becomes *indistinguishable*, the harm is not divisible." *Id.* Pet. 54a-55a (emphasis added). In fact, nothing in the Restatement or common law suggests that divisibility can never be established simply because the aggregate harm may exceed the sum of the individual harms. Nor is divisibility precluded even if the harm "attributable to each PRP becomes indistinguishable." The court's fundamental error was that it ignored the more relevant single harm/divisibility principle of Restatement § 433A(1)(b). Simply put, divisibility does *not* require the court to "distinguish" or "fingerprint" each harm and match it to a particular PRP in order for the harm to be divisible. See Restatement (Second) of Torts, § 881, illus.2.

In the case at bar, there is no question that what "drove" the remediation was the presence of numerous and distinct chemicals which were either *not* in Alcan's emulsion, or at below background levels. Nevertheless, the district court maintained that "even taking Alcan's proposition that its waste contained only oil, water, and background metals as true [that is, assuming that the emulsion is non-hazardous], the Court cannot conclude that the emulsion did not contribute to the release and clean-up costs at PAS." Pet. App. 55a-56a, n.30. Under this reasoning, CERCLA liability is not only strict, but it has become absolute, and thus far beyond Congress's original intent that the polluter should pay. As Alcan aptly observed, the court of appeals ruling in this regard "threatens to blow the limits off CERCLA liability entirely." Pet. 13.

Even assuming the worst-case scenario that this was exclusively a PCB Superfund site, the court should have considered the relative toxicity of Alcan's emulsion in apportioning costs. A good example of this is found in *Allied Signal v. Amcast International Corp.*, 177 F. Supp. 2d 713 (S.D. Ohio 2001), where the court apportioned clean up costs using a relative toxicity analysis.[12] In *Allied Signal*, the court found that both the plaintiff and defendant had dumped PAHs, a hazardous substance not unlike PCBs, at the site in question, and had produced a single harm necessitating response costs.

Evidence was introduced showing that the plaintiff was responsible for 72% of the total waste volume at the site, and that the defendant was responsible for 28%. Apropos to the case at bar, the *Allied Signal* court noted that the defendant's waste was "overwhelmingly composed of inorganic sand" [compare to Alcan's non-hazardous water and mineral oil] and thus "largely non-toxic." *Id.* at 752. Accordingly, the court properly rejected the volumetric ratio of 28% and relied on testimony showing that the relative amount of the PAHs in the defendant's waste -- since it was the presence of PAHs that drove the remediation -- to be only in the 2-3% range. Although the court agreed with the plaintiff that since the wastes were mixed or commingled, it was impossible to determine whose PAH actually contaminated the groundwater, the court was nevertheless able to make a fair apportionment of

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[12] While the apportionment of liability in *Allied Signal* was done in the context of a 42 U.S.C. § 9613(f) contribution action applying certain equitable factors, the relative toxicity factor is essentially identical to the relative toxicity factor that the court of appeals indicated in *Alcan I* is available to a defendant in a cost recovery suit under § 9607 to eliminate or limit its liability.

the costs based on the evidence.

In the case at bar, the courts below did not find the harm divisible at all, neither at the volumetric level, nor at the more appropriate toxicity level. Even accepting the district court's finding that Alcan's emulsion contained PCBs, the evidence proffered showed that Alcan's contribution of PCBs would have been only .01% of the PCBs from all other known sources, and that the total amount of PCBs constituted only 0.24% of all the hazardous wastes at this site. Pet. 12. Accordingly, at best, Alcan's fair share of liability should be but a fraction of the $13.6 million imposed. The government's attempt to challenge Alcan's evidence in this Court now (Opp. 19) is without merit, comes way too late, and in any event, is irrelevant, because the court below imposed joint and several liability regardless of PCB levels in the emulsion.

CONCLUSION

In retrospect, the court of appeals in *Alcan I* sent the petitioner on a costly and time-consuming fool's errand back to the district court to show divisibility; in the process, both courts revealed in their subsequent decisions just how foolish and absurd their interpretation of CERCLA's reach can be. Because of the inordinate liability and litigation costs associated with defending CERCLA cases, and considering that more than 15 years has been consumed in litigating this case to refine the issues, it is unlikely that the Court will ever again have this rare opportunity to address the important issues presented in this case having such far-reaching consequences.

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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